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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CHARLES EVAN FOWLER,

Appellant,

vs.

CALIFORNIA TOLL-BRIDGE AUTHORITY,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Northern District of California,  
Southern Division.

FILED

JAN 2 - 1942

PAUL P. O'BRIEN,

CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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CHARLES EVAN FOWLER,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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On appeal from the United States District Court  
for the Northern District of California, Southern  
Division.

Decision by Judge Martin I. Welsh.

In the United States District Court, for the Northern District of California, Southern Division.

No. 21412 W

CHARLES EVAN FOWLER,

Plaintiff,

vs.

CALIFORNIA TOLL-BRIDGE AUTHORITY,

Defendant.

### AMENDED COMPLAINT

Comes Now the plaintiff, Charles Evan Fowler, and by leave of court first had and obtained, files this his Amended Complaint and alleges:

#### I.

That the defendant, California Toll-Bridge Authority, is a public board and agency of the State of California, duly created by the Statutes of California, Statutes of 1929, page 1489 and amendments thereto (Act 956 General Laws); that said act provides that the defendant may be sued in its own name; that defendant has its place of business and is a resident of the State of California; that plaintiff is a resident and citizen of the State of Louisiana; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00). [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

## II.

That heretofore plaintiff, by his studies and labor, prepared plans for three different designs, together with complete estimates, for a bridge to be built across San Francisco Bay from the City and County of San Francisco to the City of Oakland, County of Alameda; that said plans called for said bridge to extend upon and through Yerba Buena Island as the pivotal point; that such structure was to cost in excess of Seventy-five Million Dollars (\$75,000,000.00); that said plans and estimates called for double deck structures with roadways on the upper deck and rapid transit tracks on the lower deck.

That said plans were designated as follows: Plan "A" which called for three 2000 feet Cantilever spans over the main channel of said Bay from San Francisco to Yerba Buena Island; Plan "B", for three 2400 feet suspension spans over said channel; and Plan "C" for three 2300 feet Cantilever spans over said channel.

That all of the said plans, designs and estimates provided for a Cantilever span, five fixed spans and a Viaduct approach from said Yerba Buena Island to the mainland of Oakland, County of Alameda.

## III.

That plaintiff prepared a fourth plan with estimates, known as Plan "D", which provided for a 4850 feet suspension span with two 2425 feet side spans over the said main channel, with the same Alameda County approach as in the other designs.

## IV.

That during all the times herein mentioned plaintiff was and now is the sole owner of all of said plans.

## V.

That the defendant has appropriated and used the plans and designs so prepared by the plaintiff, as aforesaid, without [2] the consent of and against the will of plaintiff, and in particular has so appropriated the said Design "B" in its entirety; that defendant used said plans and designs to construct a bridge across San Francisco Bay from the City and County of San Francisco to the City of Oakland, in Alameda County, using Yerba Buena Island as the pivotal point of said bridge; that said bridge was completed on or about the 15th day of January, 1939.

## VI.

That the cost of said bridge was in excess of Seventy-five Million Dollars (\$75,000,000.00), the exact cost of which is not known to plaintiff; that upon the completion thereof the defendant became indebted to the plaintiff in and for an amount equal to three per cent. (3%) of the cost of said bridge; that said sum is the reasonable value of said plans, designs and estimates so used and appropriated by the defendant, as aforesaid, and the amount of damages which plaintiff has suffered on account of said use and appropriation.

## VII.

That said Designs "A", "B" and "C" were fully set forth and described in the plans, specifications, estimates and information, which plaintiff exhibited to a Board of United States Engineers at a hearing held in the year 1916 in the City and County of San Francisco, with regard to the bridging of San Francisco Bay between said City and County of San Francisco and said City of Oakland; that plaintiff also exhibited said designs to the members of the Hoover-Young Commission, sitting with regard to the same matter; that said same designs and plans thereafter came into the hands of the defendant, its agents and servants, and were used in the construction of said bridge, as hereinabove alleged.

Wherefore, plaintiff prays for judgment against the defendant for the sum of Two Million Two Hundred Fifty Thousand [3] Dollars (\$2,250,000.00), which is three per cent (3%) of the sum of Seventy-five Million Dollars (\$75,000,000.00), and for three per cent (3%) of any additional sum it may be found that the construction of said bridge cost, over and above said sum of Seventy-five Million Dollars (\$75,000,000.00), for his costs of suit and for such other and further relief as may be meet and just in the premises.

THOMAS C. RYAN,

DANIEL V. RYAN,

Attorneys for Plaintiff.

(Receipt of Service)

[Endorsed]: Filed Feb. 3, 1941. [4]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED  
COMPLAINT

To the Plaintiff Above Named:

Please take notice that on Monday, the 24th day of March, 1941, at the hour of 10:00 A. M. of said day, or as soon thereafter as counsel can be heard, in the courtroom of Honorable Martin I. Welsh, Judge of the above entitled Court, in the Post Office Building, Seventh and Mission Streets, San Francisco, California, the defendant California Toll Bridge Authority will move the above entitled Court to dismiss the amended complaint of the above named plaintiff. [5]

Said motion will be made and based upon all the papers and proceedings on file herein, including this notice of motion, and will be made upon the grounds of:

1. Failure of the said complaint to state a claim or cause of action upon which relief can be granted; and

2. That said action does not plead facts to show the compliance of conditions precedent, as provided for and prescribed in Political Code sections 686 to 692 inclusive and 677; and

3. That this said Court has no jurisdiction over the subject matter or the defendant; and

4. That there is a non-joinder of party defendant; and

5. That said action is barred by the provisions of Sections 339 (1), 338 (3), and 343 of the Code of Civil Procedure of the State of California.

POINTS AND AUTHORITIES IN SUPPORT  
OF MOTION TO DISMISS

## 1. Analysis of the Complaint

Counsel for the plaintiff sets forth in his Points and Authorities in opposition to motion to dismiss previously made by said defendant, and heretofore filed by counsel for said plaintiff, in which plaintiff specifies that his said complaint in its original condition states a cause of action on two alternative theories. The amended complaint with the exception of a few minor allegations is practically word for word as was the original. Plaintiff's counsel contends that the two alternative theories of his pleading is (1) implied contract and (2) it is a cause of action for an infringement of plaintiff's common law copyright of the idea and design of the Bay Bridge. I interpret the last alternative view of the cause of action as one in tort of the right coming from plaintiff's common law copyright cause of action or the California statutory copyright cause of action which, of course, is such a claim as would [6] necessarily arise from a statutory enactment.

Whatever the cause of action may be or its theory is immaterial for the following reasons: No complaint can be filed against the State of California without its permission. It is true that the California Toll Bridge Authority statute expressly provides that the Authority may be sued in its own name against the Authority as a statutory agency of the State, and any cause of action or claim must be

asserted against the State. Political Code section 688 provides a specific procedure for asserting claims against the State of California and the necessary steps that must be taken for rejection of any claim. The cases hold uniformly that if the State gives its consent to be sued they can satisfy the procedural steps that must be taken in order to have a claim against the State to be successfully prosecuted.

In 1929 section 688 was amended to provide: "a claim on an express contract or for negligence against the State must be presented" etc. In the amended Statute of 1929 the word "express" was added to limit the claims arising under contract. This definitely intended to eliminate an implied contract or a statutory cause of action.

This principle of law is exemplified by

Berryessa Cattle Co. v. Sunset Pac. Oil Co.  
(Jan. 18, 1937)

Circuit Court of Appeal, District 9 in 87  
Fed 2nd (2d) 972

It will be noticed that there are no allegations in the complaint setting forth a compliance with Political Code sections 677, and 686 to 692.

The cases moreover hold that in compliance with these statutes there is a condition precedent to the establishment of the cause of action.

See also—

Rose v. Cal. 99 CAD 149

decided in the Supreme Court of California July 29, 1940 at 100 [7] CD page 23, that a rehearing of

Supreme Court decision was granted by the Supreme Court recently and is still under submission. The dissenting opinion in 100 CD 23 discusses in some detail the necessity of complying with the Political Code section 688. However, the original case upon which defendant relies is the above mentioned opinion of the Circuit Court of Appeals.

2. We are not amplifying in this memorandum what the point of contention is in our second phase of our motion to dismiss concerning the non-compliance with the statute.

3. Upon our third contention with respect to the absence of jurisdiction of this Court, substantial reasons are set forth above with respect to points 1 and 2 applying to the phase of the argument that this Court has no jurisdiction.

4. Upon our fourth contention we take the position that the real party in interest is the State of California and should be so sued even though the Statute provides that the California Toll Bridge Authority may be sued in its own name.

5. With respect the fifth contention, it has heretofore been argued before this Honorable Court and it has been ruled that the statute of limitations would not bar this cause of action. We accept this ruling to be the order of the Court but respectfully urge the grounds for the operation of the statute of limitations for the purpose of protecting the inter-

ests of the State on this point, should it be of any advantage to the State to do so.

Respectfully submitted,

LEO A. CUNNINGHAM,

Attorney for Defendant & Executive Officer of said  
Authority.

(Receipt of Service)

[Endorsed]: Filed March 12, 1941. [8]

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In the United States District Court, for the  
Northern District of California, Southern Division.

No. 21412 W

CHARLES EVAN FOWLER,

Plaintiff,

vs.

CALIFORNIA TOLL-BRIDGE AUTHORITY,  
Defendant.

MEMORANDUM OPINION AND ORDER  
GRANTING MOTION TO DISMISS

The defendant, California Toll Bridge Authority, moves to dismiss this action for, among other stated grounds, want of jurisdiction in this court to hear and determine the controversy because the defendant is in reality the State of California. This action is one to recover damages for an alleged appropriation and unauthorized use by the defend-

ant, in the construction of the San Francisco Bay Bridge, of plans and designs for such bridge prepared and owned by the plaintiff. No Federal question is presented by the allegations of plaintiff's complaint. The only ground on which the jurisdiction of this court is invoked is an alleged diversity [10] of citizenship. If the defendant is in reality the State of California, then there is no diversity of citizenship, for a State is not a citizen. And, consequently, there can be no jurisdiction in this court.

Postal Telegraph Cable Co. vs. Alabama, 155  
U.S. 482, 487; 155 Sup. Ct. 192, 194; 39  
L. Ed. 231.

And the court is not limited in its inquiry into the citizenship status of the parties, for the purpose of determining its jurisdiction, to an examination solely of the parties of record. If it appears that one of the parties is in reality, although not in name, a State, jurisdiction dependent upon a diversity of citizenship must fail.

“As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.”

In re State of New York et. al. 41 Sup. Ct.  
588; 256 U.S. 490.

Furthermore, the non-existence of a diversity of citizenship in such case is not cured by any consent on the part of the State to suit, or any voluntary submission to the jurisdiction of the court, or any waiver of immunity from suit.

State Highway Commission of Wyoming vs.  
Utah Construction Co. 49 Sup. Ct. 104;  
278 U. S. 194.

We come now to a consideration of the question of whether the defendant in this case is in reality the State of California.

The California Toll Bridge Authority, hereafter referred to as "The Authority", was created by act of the California State Legislature as an instrumentality to aid the State of [11] California in effectuating its declared policy of acquiring and owning all toll bridges situated on or along any part of the state's highways with the end in view of ultimately eliminating all toll charges. (Statutes, 1929, p. 1489)

The Authority consists of a board of five members, all state officials, acting without compensation. The Authority, in conjunction with the Department of Public Works of the State, determines upon the necessity and desirability of acquiring or constructing any particular toll bridge or other toll highway crossing. If its determination is favorable to the acquisition or construction of any such toll bridge or toll crossing, the Authority is empowered to direct the Department of Public Works to pro-

ceed therewith for and in the name of the State of California, and to issue revenue bonds to finance the same. These bonds are issued in the name of the California Toll Bridge Authority and are secured wholly by lien upon the tolls and other revenue obtained from the operation of the particular toll bridge or crossing for the acquisition or construction of which the bonds are issued, and do not constitute obligations of the State. The bonds are signed by the Director of Public Works and countersigned by the Governor. The proceeds from the sale of bonds are paid into the State Treasury and credited to a fund designated the acquisition and construction fund, and used primarily for that purpose. Disbursements from this fund are made upon demand of the Department of Public Works upon warrants drawn by the State Controller. The Department of Public Works, acting for and in the name of the State of California, has charge of the designing, acquisition and construction of all such toll bridges and other toll highway crossings, and of such transportation facilities connected therewith as may be authorized by The Authority, and of the operation and [12] maintenance of the same. All tolls or other revenue received from the operation of any toll bridge or toll highway crossing are collected by the Department of Public Works and paid into the State Treasury. These funds are disbursed primarily for purposes of bond redemption and interest payments upon warrants drawn by the State Controller at the request of the Treasurer, and for

purposes of acquisition, construction, operation and maintenance of toll bridges and toll highway crossings upon demand of the Department of Public Works upon warrants drawn by the State Controller. Whenever proceedings in eminent domain are required to be taken in connection with the acquisition or construction of any toll bridge, toll highway crossing, or transportation facilities connected therewith, such proceedings are taken by the Department of Public Works, upon direction of the Authority, in the name of the State of California. The Authority is empowered to prescribe the terms and conditions upon which transportation service may be conducted over any state owned toll bridge or highway crossing, and to grant permits therefor. The Authority, if it deems it to be to the best interest of the State, may enter into contracts with transportation companies or with political subdivisions for the use of transportation facilities over any toll bridge or toll highway crossing. Or, if it deems it to be for the best interest of the State, the Authority may itself in behalf of the State operate the transportation facilities of any such toll bridge or crossing. The Authority is also empowered to fix the form, conditions and denominations of the revenue bonds it issues, and to enter into contracts and incur various obligations in connection with its authorized activities. And it may sue and be sued. [13]

In all its functions, the Authority is representing and assisting the State in the performance of a tra-

ditional governmental function, that of building, operating and maintaining bridges and highway crossings as a part of the government system of state highways. The Authority is not a distinct and separate entity embarked upon a profit making commercial enterprise in competition with private citizens. The Authority owns no property. The bridges belong to the State. It has no capital stock. It derives no income to itself. All tolls and revenues received from the operation of the bridges are paid into the State Treasury and become state funds. The members of the Authority are all state officials none of whom receive any compensation for the services they perform as members of The Authority in addition to their regular salaries received for their services to the State. The Authority may make contracts and incur obligations, but it is not itself able to respond financially to any judgment which may be recovered against it. The holder of any such judgment would have to look to the State and to state funds for satisfaction thereof. The Authority does not act in any proprietary capacity. All of its acts are done for and on behalf of the State of California in the performance of a traditional governmental function. Finally, the Authority is in reality the State of California. And a suit against the Authority as an entity to recover a money demand, is in reality a suit to recover against the State of California.

We are not without direct authority for our position. In the case of *Kansas City Bridge Co. vs.*

Alabama State Bridge Corporation, 59 Fed. Rep. (2nd) 48, an action on contract was brought in the United States District Court against the Alabama State Bridge Corporation. Jurisdiction was based upon [14] diversity of citizenship. Judgment rendered for the defendant upon demurrer was affirmed on appeal on the ground that the State of Alabama was the real party in interest. In this case it appeared that the organization, purpose, powers and functions of the defendant, Alabama State Bridge Corporation was in all substantial details the same as the California Toll Bridge Authority. On page 49, the court in holding that a suit against the Alabama State Bridge Corporation was a suit against the State of Alabama, said:—

“It is clear that the whole purpose of the act was to erect bridges essential to the highway system, to pay for them with tolls, and then to make them free for the use of the public. It is well settled that the construction of public roads and bridges is a governmental function . . . The state may either perform this function in its own name or through its public officers or one of its governmental agencies. . . . The Alabama Bridge Corporation was but an agency or instrumentality through which the state acted in causing its public bridges to be constructed. It was not a private corporation in any sense of the word, but state officials, who might as well have been designated a board or commission, were *ex officio* members, and the

only members, of it . . . In the nature of things that state had to choose some such agency in order to effectuate its purpose . . . We are of the opinion, therefore, that this is a suit against the state of Alabama.”

In the case of *State Highway Commission in Arkansas vs. Kansas City Bridge Company*, 81 Fed. Rep. (2nd) 689, it was held that a suit against the Arkansas State Highway Commission was in reality a suit against the State of Arkansas and consequently could not be instituted in the Federal Court on the ground of a diversity of citizenship. On page 690, the court stated:—

“That under the laws of Arkansas the commission is a state agency performing governmental functions with respect to the construction and maintenance of state highways is not disputed. That it was acting as such agency in entering into the contract which is the basis of this suit is likewise undisputed. [15] The revenues available for meeting obligations incurred by that commission were state revenues. . . . The legal effect of the contract would be the same whether it stated that it was made by the state through the commission or by the commission itself. In either event, it would be a contract made and executed by an agency of the state on behalf of the state. Moreover, the purpose of this suit was to require the state to make pecuniary satisfaction for a liability

which, it has been held, would make the suit one against the state.”

In the instant case, we hold that the defendant is in reality the State of California. Since there is no diversity of citizenship, there is no jurisdiction in this court. The provision of law authorizing the defendant to sue and be sued cannot supply the jurisdictional prerequisite of diversity of citizenship which is lacking here. (State Highway Commission of Wyoming vs. Utah Construction Co. 49 Sup. Ct 104; 278 U. S. 194)

It Is Therefore Ordered, that the motion of the defendant to dismiss this action be and the same is hereby Granted.

Dated: August 14, 1941.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed Aug. 14, 1941. [16]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO  
CIRCUIT COURT OF APPEALS

Notice is hereby given that Charles Evan Fowler, plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order Granting Motion to Dismiss the Amended Complaint of plaintiff herein, which or-

der was entered in this action on the 14th day of August, 1941.

Dated: October 30, 1941.

THOS. C. RYAN,  
#1224 Hearst Building  
San Francisco, California.

DANIEL V. RYAN,  
435 Russ Building  
San Francisco, California.

[Endorsed]: Filed Oct. 30, 1941. [17]

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[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON  
ON APPEAL

The only points plaintiff and appellant relies upon on appeal herein, are the following: (1) Appellant contends that there is a diversity of citizenship between the parties hereto; (2) that the above Court has jurisdiction of the parties and the subject matter of the above action; and (3) that defendant is a separate entity from the State of California.

Dated: October 30, 1941.

THOS. C. RYAN,

#1224 Hearst Bldg.

San Francisco, California

DANIEL V. RYAN,

435 Russ Building

San Francisco, California

Attorneys for Plaintiff  
and Appellant.

(Receipt of Service)

[Endorsed]: Filed Oct. 30, 1941. [18]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 19 pages, numbered from 1 to 19, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case entitled Charles Evan Fowler, Plaintiff, vs. California Toll-Bridge Authority, Defendant. No. 21412-W., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Three dollars and five cents

(\$3.05) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 8th day of December A.D. 1941.

(Seal)

WALTER B. MALING,  
Clerk.

WM. J. CROSBY,  
Deputy Clerk.

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[Endorsed]: No. 9992. United States Circuit Court of Appeals for the Ninth Circuit. Charles Evan Fowler, Appellant, vs. California Toll-Bridge Authority, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 8, 1941.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
For the Ninth Circuit.

U.S.C.C.A. 9992  
D.C. No. 21412 W

CHARLES EVAN FOWLER,

Plaintiff,

vs.

CALIFORNIA TOLL-BRIDGE AUTHORITY,  
Defendant.

ADOPTION OF STATEMENT OF POINT  
UPON WHICH APPELLANT INTENDS  
TO RELY FILED HERETOFORE WITH  
THE CLERK OF TRIAL COURT.

To the Above Entitled Court:

Appellant, Charles Evan Fowler, hereby adopts as a statement of points upon which he intends to rely upon the appeal herein, the statement of points heretofore filed with the Clerk of the United States District Court, for the Northern District of California, Southern Division.

Dated: December 8, 1941.

THOS. C. RYAN,

#1224 Hearst Building  
San Francisco, California

DANIEL V. RYAN,

#435 Russ Building  
San Francisco, California

Attorneys for Plaintiff.

Received a copy December 9, 1941.

LEO A. CUNNINGHAM

[Endorsed]: Filed Dec. 9, 1941. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

Plaintiff and Appellant, Charles Evan Fowler,  
hereby designates the portion of the record and  
proceedings to be contained in the record on appeal  
herein.

Such contents are as follows: One (1) The  
Amended complaint of plaintiff filed herein. Two  
(2) The Motion to Dismiss the Amended Complaint.  
Three (3) The Memorandum Opinion and Order  
Granting Motion to Dismiss. Four (4) The Notice  
of Appeal.

Dated: December 8, 1941.

THOS. C. RYAN,

#1224 Hearst Building

San Francisco, California

DANIEL V. RYAN,

435 Russ Building

San Francisco, California

Attorneys for Plaintiff  
and Appellant.

[Endorsed]: Filed Dec. 9, 1941. Paul P. O'Brien,  
Clerk.

